United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2014

B P/S

UNITED STATES COURT OF APPEALS
For the Second Circuit

DOCKET NO. 74-2014

UNITED STATES OF AMERICA

Appellee,

vs.

GARY KINSEY

Defendant-Appellant

On Appeal from Judgment of Conviction in the Western District of New York.

BRIEF ON BEHALF OF THE DEFENDANT-APPELLANT

FRANK R. WEBSTER, P.C.
Attorney for Defendant-Appellant
600 Wilder Building
One East Main Street
Rochester, New York 14614
Tele: 454 - 6820 (716)

TABLE OF CONTENTS

BRIEF APPENDIX

TEXTS CITED:

STATUTES CITED:

CASES CITED:

STATEMENT

The defendant-appellant, Gary Kinsey, was indicted by the Grand Jury in the Western District of New York in 1973 for alleged violation of 21 U.S.C. §812 (21 C.F.R. § 308.11 (d) (10)), possession of marijuana. The defendant was convicted of the offense for which he was indicted on March 27, 1974, by a jury.

The charge to the jury defined marijuana, under the federal statute, as including all forms of marijuana. The Judge relied upon his understanding of the Congressional Record and legislative intent for the definition, and declined to give an instruction which included the statutory definition of marijuana, 21 U.S.C. § 802 (15). The Judge also did not permit the jury to pass on the issues of whether there were different species of marijuana or whether the commodity which the defendant had had in his possession was Cannabis sativa L., as defined by statute to be marijuana, or some other species of Cannabis, although evidence of the existence of different species was admitted.

QUESTIONS PRESENTED:

I. Was it Error for the Trial Judge to Instruct the Jury that Marijuana, Statutorily Defined as Cannabis sativa L., is meant to cover all forms of the Plant Cannabis?

II. Did Proof of the Existence of Different Species of Cannabis Define a State of Facts such that an Instruction, to the Effect that only One Species of Cannabis Existed, Constitute an Impermissable, Irrebutable Presumption in Violation of Due Process of Law?

III. The Government Failed to Prove that the Defendant-Appellant Possessed a Narcotic Drug Capable of Causing an Altered State of Consciousness.

FACTS

On the 29th day of August, 1973 in the Western District of New York, the defendant-appellant, Gary Kinsey, was charged with Possession with the Intent to Distribute Marijuana. A. Schedule I controlled substance as set forth in Title 21 U.S.C. § 812 (21 C.F.R. 308.11 (d) (10)): The Government Chemist indicated that the chemical test performed on the substance in issue indicated the presence of tetrahydrocannabinol a chemical known as THC (79).

Upon this proof having been taken the Government rested its case and the defendant moved to dismiss the Indictment on the grounds that the Government failed to establish a prima facie case. The issue for the Government was to prove a prima facie case that the substance in issue was Cannabis sativa L. (3,4).

The defendant asked permission of the Court to call Dr. Thomas Ferrari, a Botanist and Plant Physiologist, as an expert witness (11). Dr. Ferrari testified regarding the plant Cannabis sativa L., in relation to accepted botanical nomenclature based upon Linneaus, the L representing the scientist Linneaus who discovered and named the plant (16). Dr. Thomas Ferrari was acknowledged to be an expert, testified that the genus Cannabis includes more than three species namely: Cannabis sativa L., Cannabis indica Lam., Cannabis ruderalis J., and other unnamed species (14, 15,18,33). Dr. Ferrari further testified that there are conservatively 250,000 plants in the Plant Kingdom, excluding algae and fungi and 600 of these plants have cystolith hair (53). Further, that 25 plants out of 250 plants tested gave a postive Duquenois (53). By extrapolating these figures, there could be 25,000 plants giving a postive Duquenois (53).

Dr. Ferrari further testified that Cannabis sativa L. was a botanical designation of a single species of the polytypic

genus (48,49). He further testified that none of the Government tests could distinguish the separate species (55). He further testified that the Mass Spectrometer would be a very reliable method in which to identify the plant material in question (23,24).

In rebuttal to Dr. Thomas Ferrari's testimony, the Government called Dr. Arthur Cronquist, who took the position that there was only but one species of marijuana and that other designations namely: Cannabis indica Lam., Cannabis ruderalis J., were simply varieties of Cannabis sativa (89,96,98).

The defendant-appellant argued that the federal statute proscribes possession of Cannabis sativa L., only, and since the Government introduced no convincing evidence to show that the seized substance was Cannabis sativa L., rather than one of the other species of Cannabis, the Government failed to prove an essential element of its case beyond a reasonable doubt (3). Further, the defendant-appellant raised the issue that there was no evidence that the plant material in question contained an usable amount of THC (35).

The defendant-appellant submitted a requested charge for the statutory definition of "Marijuana" and further requested that the jury must find beyond a reasonable doubt that the defendant knowingly and unlawfully possessed not Cannabis only, but

Cannabis sativa L. (76,77,78).

The court having refused this requested charge and instead charged the following:

> "When Congress used the term Cannabis sativa L., it meant to and did include Cannabis ruderalis J. and Cannabis indica Lam. I instruct you as a matter of law that the term "Marijuana" means all parts of the plant Cannabis sativa L. and further, that Cannabis sativa L., includes Cannabis ruderalis J. and Cannabis indica Lam." (71,72).

POINT I

IT WAS ERRONEOUS FOR THE COURT IN LIGHT OF THE REVISIONS IN THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970, TO INSTRUCT THE JURY THAT MARIJUANA INCLUDES ALL KINDS AND FORMS OF THE PLANT CANNABIS.

The question before this court, the construction to be given to the term "Marijuana", is not, strictly speaking a question of first impression. The identical question was considered under 26 U.S.C. § 4761 (since repealed), in United States v. Rothberg, 480 F 2d 534 (2d Cir. 1973). The court in that case affirmed a conviction for transporting and concealing marijuana, rejecting an offer of proof that different species

of Cannabis existed. The offer was rejected, without regard for scientific inaccuracy, because the statute conformed to the scientific belief at the time of its passage. Id. at 536.

Rothberg is not controlling in this case, however, not only because the evidence was admitted here, but also because the statute has been amended. In point of fact, Rothberg distinguished itself from all future cases:

> " For the future, it would appear that the question is academic, since the statute has been replaced by the present drug abuse prevention and control acts, with much broader descriptions of controlled drugs in addition to the description in question here, the broader descriptions concededly covering this substance whether described as one designation of Cannabis or another."

It is conceded here, as in Rothberg, that the present laws can be construed to encompass the substance in question. However, there are fairly clear indications that the provisions of the act which do embrace the present case are not the provisions under which the defendant was indicted and convicted.

Congress, admittedly was aware that the psycho-active ingredient in marijuana was available in preparations other than statutorily defined marijuana. The Congressional Record contains reports of tetrahydrocannabinol in pure form (91st Cong.

2d Session Vol. 116 pt. 26 P. 35556, dated October 7, 1970). Moreover, the district court opinion in United States v Moore, 330 F. Supp. 684 (E.D. Pa. 1970), which expressly raised the issue of the different species of Cannabis had been handed down before the Controlled Substance Act took effect. Knowledge of the growth in scientific knowledge was available to the Congress at the time of passage of the Act. Congress did not choose to change the statutorily precise definition given to marijuana, however; rather it endeavored to control the abuse of substitutes for marijuana by enacting a special provision controlling:

> [U]nless specifically excepted or unless listed in another schedule, any material. Coumpound, mixture, or preparation, which contains any quantity of ... (17) tetrahydrocannabinols.

21 U.S.C. 812 (c).

The specific statutory definition for marijuana given in 21 U.S.C. § 802 (15) supra, not only designates a specific plant, but also excludes from that definition the non-psychoactive portions of the plant. (See "Marijuana and Health - A Preliminary Report", 116 Cong. Rec. 35556 (Oct. 7, 1970). Tetrahydrocannabinol is acknowledged to be a psycho-active ingredient in marijuana. Id. The inclusion of a provision for the tetrahydrocannabinols in the Controlled Substance Act thereby

complements the provision applying to marijuana as statutorily defined, as it is aimed at controlling preparations containing the psychoactive ingredient of marijuana presented in any other form. The integrity of the statutory definition is thereby preserved compatably with the purpose of the statute. It is submitted that the statutory change including coverage of other species of Cannabis within the rubric of 21 U.S.C. § 812 (c) (17) is the "broader description" alluded to in Rothberg.

The distinction suggested is fully supported by the rules of statutory construction. It is authoritatively stated that "statutory definitions of terms used therein prevail over colloquial meanings." Western Union v. Lenroot, 323 U.S. 490, 502 (1944). Similarly, in Barber v. Gonzalez, 347 U.S. 637, 643 (1954), the Court, stressing the similarity of a deportation statute to a criminal statute, stated:

> "In the absence of explicit language showing a contrary congressional intent, we must give technical words in deportation statutes their usual technical meaning."

It is axiomatic that the same approach should be taken in the present case, in which a criminal statute is involved with the attendant requirement of strict construction. In the present case, Congress has chosen to statutorily define a term by using

technical terms capable of precise meaning in a criminal statute. All the indices require that the case be decided on what Congress wrote rather than on what it might have written. U.S. v. Collier, D.C. Super Ct., 3/19/74, (14 CrL. 2503).

There is, of course, an exception to the general rules noted above; if the statutory language vitiates the purpose of the Act, the courts need not follow the express language. Lawson v. Suwanee S.S. Co., 335 U.S. 198,201 (1948). That exception underlies the decisions in Rothberg and Moore, supra. With the amendment of the Act to provide for mixtures containing tetrahydrocannabinols, however, the exception no longer applies, since there is no reason to strain the statutory language. With that exception inapplicable, it must be recognized that this is a case in which the language and purpose of the questioned statute is clear, and the courts must follow the legislative direction in interpretation.

Given that marijuana consists of Cannabis sativa L., and that the government tests in question demonstrate at most the presence of psycho-active THC, it follows that the defendant, charged with possession of Cannabis sativa L., was convicted of a crime which he did not commit. That such a variance between the charge and the proof justifies reversal is hornbook law.

24 B C.J.S. "Criminal Law" § 1928 at 252, U.S. v. Collier, supra. That such a variance justifies reversal in the federal courts is undoubted. Governor of Virgin Islands v. Aquino, 378 F.2d 540 (3d Cir. 1967). the present case most closely approximates that of Stirone v. United States, 361 U.S. 212 (1960). In that case the Grand jury had indicted the defendant under the Hobbs Act for interfering with interstate commerce in sand by extortion. However, he was convicted in part for interfering with interstate commerce in steel by extortion. The Supreme Court reversed the conviction, saying:

> "It follows that when only one particular kind of commerce is charged to have been burdened, a confiction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened."

By direct analogy, the proof in the instant case went to a commodity other than that charged, and a reversal is mandated.

In U.S. v. Collier, the court took the position that should the statute be construed to mean that is is unlawful to possess Cannabis plants or other species which are not chemically distinguishable from the sativa species, the burden would remain on the Government to prove that the alleged contraband, marijuana is in fact chemically identical to Cannabis sativa L. In the

present case, as well as Collier, the Government did not attempt to make such a showing, in fact, Chemist Jeffrey Weber testified that the Government possessed and he was in full control of a Mass Spectrometer, that would positively identify the substance in issue, but that using the instrument to test alleged marijuana plants was not used because it gets the lense dirty

Given that the Government has the wherewithall to answer this pressing question, as to the possible variations among the species and the Government has in its possession a Mass Spectrometer and refuses to use the same; it would seem apparant that the reason for this refusal may well be the Government's fear that more expensive research will indeed disclose chemical variations among the species. U.S. vs. Collier, supra.

POINT II

THE INSTRUCTION THAT MARIJUANA MEANS ALL FORMS OF CANNABIS, IN THE FACT OF STATUTORY LANGUAGE AND EVIDENCE TO THE CONTRARY, IS EQUIVALENT TO AN IRREBUTABLE PRESUMPTION AND VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The second major distinction between Rothberg and the case at bar is that in the present case the Judge permitted the defense to present evidence as to the existence of the various species of Cannabis. In contrast, Rothberg was decided on the basis of an offer of proof. The distinction is not without significance, and it is consistent with the judicial treatment of expanding scientific knowledge. The expansion is not analogous to the development of new technologies and the reliability of testing procedure, as is the case of a voiceprint or a lie detector, but rather involves expanding scientific knowledge of a well known substance, allowing for greater precision in identification. The path of acceptance of this scientific knowledge is closely analogous to the gradual acceptance of blood grouping as evidence in paternity actions as certainty and acceptability increased. The early cases acknowledged and admitted test on the A-B-O or M-N groupings (see Annot. "Blood Grouping Tests," 46 A.L.R. 2d 1000), as research increased, however, knowledge of other factors, previously unknown, was accepted as evidence. In Groulx v. Groulx, 98 N.H. 481, 103 A. 2d 188 (1954), the court admitted testimony on the basis of the S factor. In Saks v. Saks, 189 Misc. 667, 71 N.Y.S. 2d 797 (1947), and Cuneo v. Cuneo, 198 Misc. 248, 96 N.Y.S. 2d

899 (1950), the test based on the rh factor was accepted. The Cuneo court stated:

> "To reject such testimony would be tantamount to rejecting scientific fact. Courts should apply the results of science, when competently obtained, in aid of situations presented. To reject such testimony is to deny progress. When competently developed and declared, scientific results are entitled to great weight."

96 N.Y.S. 2d at 906.

A similar pattern exists in the growth of knowledge about marijuana. As noted above, in Rothberg, an offer of proof as to the polytypal nature of Cannabis was rejected; however, in United States v. Gaines, 489 F.2d 690 (5th Cir. 1974), a case turning on whether the government chemist was adequately trained, not only was evidence of the polytypal nature of marijuana admitted, but the government conceded that three species existed. Id. at 691. It is clear that a state of facts, contrary to what the law presupposes, may exist.

In the present case, testimony was admitted which tended to establish that different species of marijuana exist. Whether marijuana is polytypal would have been a typical fact question, and whether the substance found was marijuana, as statutorily defined, would have been a typical problem of the

application of facts to law had the judge at trial not defined the problem away by his instruction. The case presents a situation in which the evidence points to one set of facts which the law, by fiat, replaces with quite another. Granting that it is the duty of a court to declare the law, it is asserted that it is not proper for a court to declare as law a state of facts contrary to reality such that conviction rests upon a legal fiction. It sets forth a judicially created presumption, in conflict with the statutory language, closely analogous to that struck down in Leary v. United States, 395 U.S. 6 (1968). In that case the statute in question provided that proof of possession of marijuana constituted presumptive evidence of the fact of knowledge of illegal importation, regardless of whether that presumption was contrary to fact. In this case, the judicial construction is set forth as an equally ficticious basis for conviction, which is equally violative of due process. It is no more proper to presume that a person "knows" his marijuana is imported once it is established that a significant precentage is not imported at all, than it is to presume that all substances containing tetrahydrocannabinol are marijuana, as statutorily defined once it is established that other species exist. Thus, under Leary, supra, and Tot v. United States, 319 U.S. 463 (1943),

the instruction as given by the trial judge was violative of due process of law, in contravention of the Fifth Amendment of the United States Constitution.

POINT III.

THE GOVERNMENT FAILED TO PROVE THAT THE DEFENDANT POSSESSED A NARCOTIC DRUG CAPABLE OF CAUSING AN ALTERED STATE OF CONSCIOUSNESS

During the course of the trial testimony was heard that the defendant allegedly picked the plant material in the Midwest. Dr. Arthur Cronquist testified that the marijuana or hemp plants in the Midwest were basically grown as an agricultural crop for the stalk which was used for the making of hemp and that due to this cultivation, the THC content was extremely low. On this issue the present case seems clearly governed by the decision in Payne vs. U.S. 294 A.2d 503, here the court reversed a marijuana possession conviction because the prosecution failed to show that the defendant possessed a usable amount of the substance. It is thus plain that even if the defendant's plants were of the Cannabis sativa L. species prescribed by Section 802 (15) of Title 21 U.S.C., that the defendant nevertheless be entitled to an acquittal in this case, since the plants

that he allegedly possessed were not proved to contain an amount of THC, the psycho-active agent in "marijuana", sufficient to render the plants usable as a narcotic drug (See also Doctrine of Edelin v. U.S., 227 A.2d 395 (D.C. App. 1967).

CONCLUSION

The statutory definition of marijuana is a precise technical definition, used in a criminal statute, and should be strictly and literally construed. Prior cases have reached a contrary result in order that the purpose of the antecedent statute not be thwarted. However, those earlier cases themselves recognize that that exception has been negated by the amended statute, which contains adequate provisions to cover the situation underlying this case.

Given that the statutory definition is controlling, the accused, although he may have committed some other crime, was convicted of a crime which he did not commit, and is therefore, entitled to a reversal.

The admission into evidence of testimony tending to prove that various species of marijuana exist was proper, due to the growth of scientific knowledge. The jury was not permitted to pass on this evidence, however, because the judge

instructed them that the law presupposed a contrary state of facts. This instruction, a judicial construction contrary to the statutory language, was tantamount to an irrebutable presumption, which violates the accused's right to due process of law.

For all of the above reasons, it is respectfully urged that the conviction be reversed and the indictment dismissed with prejudice to the Government's right to re-indict the defendant.

Respectfully submitted,

FRANK R. WEBSTER, P.C.
Attorney for Defendant-Appellant

AFFIDAVIT OF SERVICE OF BRIEF & APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA Appellee, - vs - GARY KINSEY Defendant - Appellant	DOCKET NO. 74-2014

STATE OF NEW YORK)
COUNTY OF MONROE) ss:
CITY OF ROCHESTER)

Marianne L. Nicholas, being duly sworn, deposes and says:

That she is not a party to this action; that she is over the age of 18 years and resides in the City of Rochester, County of Monroe and State of New York.

That on the 2nd day of August, 1974 a copy of the Brief and Appendix in the above captioned matter was served upon Gerald Houlihan, Esq., United States Attorney, U.S. Courthouse, 150 State Street, Rochester, New York 14614 enclosed in a post paid wrapper properly addressed to Gerald Houlihan, Esq., and deposited in a post office official depository under the exclusive care and custody of the United States Postal Service within New York State.

Marianne L. Nicholas

MARIANNE L. NICHOLAS

SWORN to before me this the
2nd day of August, 1974

Lynda M. Rochat

LYNDA M. ROCHAT
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 19..75

COUNSELLOR AT LAW
WILDER BLDG. — SUITE 600
EXCHANGE STREET
ROCHESTER, N. Y. 14614

74-2014

UNITED STATES COURT OF APPEALS For the Second Circuit

DOCKET NO. 74-2014

UNITED STATES OF AMERICA

Appelle

- vs -

GARY KINSEY

Defendant-Appellant

BRIEF - On Appeal from Judgment of Conviction in the Western District of New York

FRANK R. WEBSTER
COUNSELLOR AT LAW
WILDER BLDG. — SUITE 600
EXCHANGE STREET
ROCHESTER, N. Y. 14614

FRANK R. WEBSTER